COMMONWEALTH OF KENTUCKY
SUPREME COURT

NO. 2014-SC-000512-D

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SUPREME COURT

AEP INDUSTRIES INC. — APPELLANT

v.

B.G. PROPERTIES, INC. — APPELLEE

APPELLANT'S BRIEF

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed this 31st day of July, 2015, to the following: Honorable Steve Wilson, Warren Circuit Court, 1001 Center Street, Suite 404, Bowling Green, Kentucky, 42101; Charles E. English, Jr., Esq., Michael S. Vitale, Esq., David W. Anderson, Esq., English, Lucas, Priest & Owsley, LLP, P.O. Box 770, Bowling Green, Kentucky, 42102-0770; and Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40602.

PAUL HERSHBERG

INTRODUCTION

This litigation arose out of a real estate lease with a purchase option between Plaintiff/Appellant AEP Industries Inc. ("AEP") as lessee, and Defendant/Appellee B.G. Properties, Inc. ("BG") as owner/lessor, of a parcel of industrial property located in Bowling Green, Kentucky. AEP sought to exercise its purchase option, and when BG refused to sell, AEP filed an action in the Warren Circuit Court, which entered an order of specific performance requiring BG to transfer the property as required by the parties' option agreement.

BG then voluntarily transferred the property to AEP, receiving and negotiating AEP's payments of several million dollars. After the transfer BG filed an appeal of the Warren Circuit Court order of specific performance, but did not post a bond or supersede the judgment. The Court of Appeals reversed the Warren Circuit Court's specific performance order as premature, and remanded the matter.[1] AEP requests that this Court vacate and reverse the Court of Appeals' July 25, 2014 Opinion and reinstate in full the Warren Circuit Court's December 19, 2012 order granting AEP specific performance.

[1] Court of Appeals Opinion, attached hereto as Exhibit A. The Circuit Court Order is attached hereto as Exhibit B.

STATEMENT CONCERNING ORAL ARGUMENT

AEP and its counsel respectfully request that the Court schedule oral argument in this matter because the Court may benefit from presentations from the parties.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

AEP manufactures flexible plastic packaging at an industrial facility located in Bowling Green, Kentucky (the "Subject Property"), which facility was owned by BG during the period relevant to the instant dispute, and leased to AEP with an option to purchase. In short, in August 2011, AEP timely exercised the option to purchase the Subject Property from BG.[2] The option agreement specifically set forth a detailed, unambiguous process for determining the final purchase price for the Subject Property. This mechanism included the parties first exchanging non-binding appraisals.[3] If the parties could not mutually negotiate a purchase price based on these non-binding appraisals, then the parties would appoint an independent third appraiser to appraise the Subject Property and to conclude on a final and binding fair market value purchase price for the Subject Property.[4] Once the binding, final purchase price was determined by the independent third appraiser, AEP had seven days to either accept the final purchase price and purchase the Subject Property, or to terminate the written option and move.

BG refused to comply with the option, including refusing to appoint the independent third appraiser. As a result, AEP filed this lawsuit seeking specific performance of the option.

A. The Subject Property And The Lease

The Subject Property consists of an approximately 167,000 sf, one-story industrial building, on approximately 19.69 acres, located at 123 Williamette Lane, Bowling Green, Kentucky.[5] AEP, as tenant, subleased the Subject Property from BG, as landlord.[6] The

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[2] Complaint, ¶ 13 (RA 5).

[3] Complaint, ¶¶ 15, 17 (RA 5-6).

[4] *Id.*, ¶ 11 (RA 3-4).

[5] *Id.*, ¶ 5 (RA 2-3).

Sublease for the Subject Property expired in August 2011.[7] Thereafter AEP was a month-to-month tenant.[8]

B. The Option To Purchase And Methodology

In addition, AEP also had a separate written option agreement to purchase the Subject Property (the "Option").[9] Pursuant to the Option, AEP had the right to purchase the Subject Property from BG for its fair market value, which is defined in the Option as follows:

> The purchase price for the Premises shall be its fair market value based on its highest and best use, plus the value of all special features and fixtures located therein for AEP's use as an extrusion and flexible packaging manufacturing facility.[10]

The Option also sets forth, in detail, the procedures by which the fair market value purchase price for the Subject Property was to be determined, including the exchange of non-binding appraisals and, if necessary, the appointment of an independent third appraiser:

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[6] The sublease is set forth in three agreements: (1) the October 31, 1990 Lease Agreement (RA 10-36); (2) the September 1, 1991 Sublease (RA 56-74); and (3) the February 10, 2006 Assignment and Assumption of Sublease (RA 87). These three agreements shall collectively be referred to in this Brief as the "Sublease."

[7] *See* Agreement Modifying Sublease and Option (RA 90).

[8] The parties agreed to extend the Sublease, on a month-to-month basis, until the date of closing under the Option, but by no later than June 1, 2012; and AEP agreed to pay BG monthly rent, totaling $58,283.92 until the closing, but by no later than June 1, 2012. *See* September 21, 2012 Agreement Modifying Sublease and Option at ¶¶ 3 and 8 (RA 91, 95).

[9] The option is set forth in two agreements: (1) the August 14, 2001 Consent to Assignment of Lease and Grant of Option to Purchase (RA 76-85); and (2) the September 21, 2010 Agreement Modifying Sublease and Option (RA 89-97). These two agreements shall collectively be referred to in this Brief as the "Option."

[10] September 21, 2010 Agreement Modifying Sublease and Option at ¶ 4 (RA 92).

> [Defendant] shall obtain, at its cost, an appraisal by a real estate appraiser with MAI or equivalent credentials whose principal place of business is located within Warren County, Kentucky, within thirty (30) days after notice by [Plaintiff] of its exercise of its option to purchase. Upon receipt of such appraisal, it shall deliver same to [Plaintiff]. If [Plaintiff] disagrees with such appraised price, it may obtain, at its cost, an appraisal from an appraiser with at least equal credentials to the appraiser selected by [Defendant] and shall provide a copy thereof to [Defendant] within thirty (30) days after [Defendant] delivers its appraisal to [Plaintiff]. **If the parties are not able to agree as to a purchase price based upon the two (2) appraisers, they shall then request the appraisers to select a third appraiser with credentials at least equal to those of the two appraisers who shall render his appraisal within thirty (30) days after selection. The appraised fair market value as established by the third appraiser shall be the purchase price and shall be final and binding on the parties.**[11]

After the completion of this process and the determination of the fair market value purchase price of the Subject Property by the independent third appraiser, AEP then had the contractual right, in its sole discretion, either to (i) purchase the Subject Property at the final purchase price as determined by the independent third appraiser, or (ii) terminate the Option and vacate the premises.[12] If AEP chose to purchase the Subject Property for the fair market value as determined by the independent third appraiser, then the closing was to occur by no later than June 1, 2012.[13]

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[11] *See* August 14, 2001 Consent to Assignment of Lease and Grant of Option to Purchase at ¶ 2 (RA 79) (emphasis added).

[12] *See* September 21, 2010 Agreement Modifying Sublease And Option at ¶ 6 (RA 93-94). AEP also had the right to exercise a five year option to continue to sublease the Subject Property. However, AEP made it clear to BG that it would not exercise that five year option. If AEP did not purchase the Subject Property, then AEP would vacate the Subject Property and move to the facility in Ohio that AEP also had under contract. *See, e.g.* Pritchett dep. at 88-89 (RA 1127-1128).

[13] *See id.* at ¶¶ 3 and 8 (RA 91-92, 95-96).

C. AEP's Exercise Of The Purchase Option

On August 11, 2011 AEP timely exercised the Option and notified BG in writing thereof.[14] As contemplated by the Option, the parties each hired a separate appraiser to value the Subject Property: AEP hired CBRE, Inc.; and BG hired the Brantley Appraisal Company.[15] BG's appraiser concluded to an estimated market value of the "leased fee interest"[16] of the Subject Property of $7,500,000 (the "BG Appraisal"); and AEP's appraiser concluded to a fair market value of $3,550,000 for the "fee simple interest" (the "AEP Appraisal").[17] Each party rejected the other's non-binding appraisal, as they were entitled to do under the Option.[18] But when AEP naturally resisted BG's inflated valuation, BG refused to participate in the appointment of the independent third appraiser, as contemplated by the Option.[19] Instead, BG tried to hold AEP hostage, demanding either that AEP pay the grossly inflated purchase price for the Subject Property, or continue to pay BG rent at above-market rates indefinitely.

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[14] RA 100.

[15] *See* Complaint ¶¶ 16-17 (RA 5-6).

[16] A "leased fee interest" is when the property is leased, and "[t]he ownership interest held by the lessor, which includes the right to the contract rent specified in the lease plus the revisionary right when the lease expires." *See* Appraisal Institute, THE APPRAISAL OF REAL ESTATE, THIRTEENTH EDITION at 113-114 (RA 254-255).

[17] A "fee simple interest" is the "[a]bsolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat." *See* Appraisal Institute, THE APPRAISAL OF REAL ESTATE, THIRTEENTH EDITION at 113-114 (RA 254-255). *See also* Circuit Court Order at ¶ 2 (RA 1332).

[18] *See* Complaint at ¶¶ 16, 18 (RA 5-6).

[19] *Id.* at ¶ 21 (RA 6-7).

D. AEP's Institution Of The Underlying Litigation

As a result of BG's ultimatum, AEP was compelled to file the underlying action seeking, among other things, specific performance of the Option and the appointment of the independent third appraiser.[20]

In response to the lawsuit, BG filed a counterclaim, in summary alleging that (1) BG was entitled to additional monies relating to the condition of the Subject Property's roof, and (2) AEP's non-binding appraisal was somehow defective and therefore BG had no obligation to proceed with the independent third appraiser.[21]

On September 11, 2012, the Circuit Court issued an order requiring the parties to appoint an independent third appraiser to appraise the Subject Property pursuant to the Option.[22] BG then insisted on appointing appraiser G. Herbert Pritchett (""Pritchett") as the independent third appraiser.[23] In a good faith effort to resolve this matter, AEP ultimately agreed to the appointment of Mr. Pritchett.[24] The parties agree that Pritchett was a licensed Kentucky MAI appraiser, and was qualified to appraise the Subject Property per the Option.[25]

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[20] *See* RA 1-103, Complaint and exhibits.

[21] RA 104-120.

[22] RA 630-631.

[23] *See* Plaintiff/Counter-Defendant's Motion to Compel Closing and Sale of the Subject Property at ¶ 8 (RA 664).

[24] *Id.*

[25] Among other things, Pritchett is an MAI (Member of the Appraisal Institute) designated appraiser, with the highest level of certification in Kentucky (as well as Tennessee, Illinois and Indiana), and he holds the CCIM designation from the Commercial Real Estate Investment Institute of the National Association of Realtors. In addition, Pritchett is one of only five members of the Kentucky Real Estate Appraisers Board which oversees the licensing, certification and discipline of all appraisers in Kentucky. *See* Final Appraisal at Ex. E (RA 794).

On September 18, 2012 Pritchett, the parties' representatives, and their counsel met at the Subject Property for approximately six hours.[26] Among other things, Pritchett, the parties, and their attorneys toured the Subject Property and gave Pritchett presentations regarding the Subject Property.[27] BG also provided Pritchett with a detailed written list of the purported "special features and fixtures," each of which BG insisted had to be included and separately appraised under the terms of the Option and the Circuit Court's September 11, 2012 Order.[28]

On September 30, 2012, Pritchett issued his independent third appraisal of the Subject Property (the "Final Appraisal"), concluding to a total fair market value of $3,834,000 for the Subject Property (the "Final Purchase Price").[29] Pritchett's September 30, 2012 valuation included a separate value for the "special features and fixtures."[30] The Final Appraisal specifically included an analysis and separate final market values for every single one of the "special features and fixtures" that BG had identified on its written list to Pritchett.[31] In deposition, Pritchett elaborated on his methodology for valuing the special features:

> **Question:** How did you identify these six groups of special features and fixtures?
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> **Pritchett:** In an email supplied by [BG's attorney] from [BG] in the packet that he supplied me when we appraised the property, inspected the property.

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[26] *See* Final Appraisal at 7 (RA 681).

[27] *See* Plaintiff/Counter-Defendant's Motion to Compel Closing and Sale of the Subject Property, ¶ 8 (RA 664).

[28] *See* Pritchett dep. at 86 (RA 1127).

[29] RA 679. The Final Purchase Price also included separate values for each of the "special features and fixtures," consistent with the terms of the option.

[30] RA 675, 707-708.

[31] RA 707-708.

> **Question:** These were the items that [BG] identified to you as being the special features and fixtures of the subject property, correct?
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> **Pritchett:** Correct.
>
> **Question:** Were there any other items that [BG] or [BG's attorney] or anybody else identified to you as special features and fixtures of the subject property which would be included in your appraisal?
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> **Pritchett:** No.[32]

E. AEP Exercises Its Right To Purchase The Subject Property

Pursuant to the unambiguous language in the Option, Pritchett's $3,834,000 concluded value in the Final Appraisal (*i.e.*, the Final Purchase Price) became the final and binding purchase price for the Subject Property.[33]

Within seven days thereafter, AEP timely exercised its right under the Option, notifying BG that it would purchase the Subject Property for the Final Purchase Price.[34] Importantly, if the Final Purchase Price had been determined to be something materially different (*e.g.*, the excessive price that BG had demanded), then AEP would not have purchased the Subject Property and, instead, would have vacated the Subject Property and moved to a facility in Ohio, which AEP already had placed under contract to purchase.[35] The Final Appraisal, however, resolved that issue and established the Final

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[32] Pritchett dep. at 86 (RA 1127).

[33] *See* August 14, 2001 Consent to Assignment of Lease and Grant of Option to Purchase at ¶ 2 (RA 79) ("The appraised fair market value as established by the third appraiser shall be final and binding on the parties.").

[34] *See* Plaintiff's Brief in Support of Motion for Partial Summary Judgment (RA 132).

[35] AEP also had placed under contract another industrial facility located in Ohio as a contingency in the event that AEP decided to reject the final purchase price for the Subject Property and move. AEP ultimately agreed to purchase the Subject Property, and not purchase the Ohio property, based on the Final Purchase Price for the Subject Property being $3,834,000. *See* Pritchett dep. at 88-89 (RA 1127-1128).

Purchase Price, which became binding on the parties, and upon which AEP relied in agreeing to purchase the Subject Property.

BG, however, refused to schedule the closing, in further material breach of the Option.[36] Instead, BG improperly demanded that the Final Purchase Price be increased by millions of dollars.[37]

F. The Warren Circuit Court's December 19, 2012 Order Compelling Specific Performance

On December 19, 2012 the Circuit Court issued the Circuit Court Order.[38] Among other things, the Circuit Court Order held that BG had violated the Option when it "refused to participate in the selection of the independent third appraiser" and "refused to schedule the closing of the sale of the Subject Property."[39] The Circuit Court Order ordered BG to sell the Subject Property to AEP by December 31, 2012 for $3,426,012.63 (*i.e.*, the Final Purchase Price minus a rent credit). In addition, the Circuit Court Order held that if BG decided to appeal the Circuit Court Order, then the Circuit Court would set a bond hearing in January 2013 to determine the amount of a bond and to determine whether future rent payments should be paid into the Circuit Court pending the appeal.[40]

G. BG's Transfer Of The Subject Property And Simultaneous Pursuit Of This Appeal

BG did not seek a stay of the Circuit Court Order or post a supersedeas bond, as was its right. Instead, on December 30, 2012 BG complied with the Circuit Court Order and voluntarily transferred the Subject Property to AEP in return for payment of the

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[36] *See* Complaint ¶ 21 (RA 6-7).

[37] *Id.*

[38] *See* Circuit Court Order (Exhibit B hereto).

[39] *See* Circuit Court Order at ¶¶ 4 and 11.

[40] *Id.* at 3.

$3,426,012.63 price after the rent adjustment. Transferring the Property on these terms enabled BG to realize a tax benefit for selling the Subject Property during calendar year 2012, relieved BG of the cost of purchasing and posting a bond, and perhaps most importantly protected BG from the very real probability that AEP would choose to move its operations to Ohio, leaving BG with a large property for which it had no other ready or willing buyer or tenant.

BG conveyed to AEP a warranty deed for the Subject Property. Since purchasing the Subject Property, AEP has made, and will continue to make, extensive modifications and investments at the Subject Property, including hiring more employees and installing millions of dollars of additional equipment at the Subject Property. AEP would not have made these material investments if its title to the Subject Property was not clear.

Thereafter, in January 2013, despite having transferred the Subject Property to AEP on the date described above, BG nevertheless proceeded to appeal the Circuit Court Order, complaining about, among other things, the methodology for the AEP Appraisal. That appraisal, of course, was non-binding on BG and did not ultimately affect the Final Purchase Price of the Subject Property under either the terms of the Option or the Final Appraisal.

H. The Court of Appeals Opinion Vacating And Remanding

On July 25, 2014 the Court of Appeals issued the unpublished Court of Appeals Opinion, reversing the Circuit Court Order and remanding the case to the Circuit Court for further proceedings regarding the non-binding appraisals.[41] In short, the Court of Appeals Order held that the Circuit Court Order (as well as the Circuit Court's September 12, 2012 order appointing Pritchett as the independent third appraiser) should

[41] *See B.G. Props. v. AEP Indus.*, 2014 Ky. App. Unpub. LEXIS 587 (Ky. Ct. App. 2014), attached hereto as Exhibit C.

be vacated because they were premature.[42] Instead, the Court of Appeals Opinion held that the Circuit Court must first determine whether the non-binding AEP Appraisal "comports with Section 4 of the Option" because if it doesn't, then "AEP may have breached a material term of the Option and under Kentucky law would not be entitled to the remedy of specific performance."[43] The Court of Appeals Opinion further states that BG has alleged that the AEP Appraisal violates the Option because it "did not consider the highest and best use of the industrial property and the value of the special features and fixtures thereof as mandated by Section 4 of the Option."[44]

The Court of Appeals Opinion also held that, even though BG did not seek a stay or post a supersedeas bond and, instead, voluntarily transferred the Subject Property to AEP for a $3,426,012.63 payment, BG's appeal was still not moot.[45] In support, the Court of Appeals Opinion relied on *Dreamers LLC v. Don's Lumber & Hardware, Inc.*, 366 S.W.3d 381 (Ky., 2011), which involved the payment of a money judgment and not the transfer of real property.[46] The Court of Appeals Opinion states that it "can find no distinguishable difference in the facts of this case where the court has ordered the transfer of the property, notwithstanding that contractual disputes remain between the parties as set out in the counterclaim."[47]

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[42] *See* Court of Appeals Opinion at 11.

[43] *Id.* at 8.

[44] *Id.* at 4.

[45] *Id.* at 10.

[46] *Id.* at 8-9.

[47] *Id.* at 8.

On August 22, 2014 AEP filed with this Court a timely motion seeking discretionary review of the Court of Appeals Opinion. On June 3, 2015 this Court issued the Order Granting Discretionary Review.

ARGUMENT

AEP submits that the Court of Appeals committed two material errors in its analysis: (1) failing to conclude that BG had allowed the matter to become moot when it failed to bond and supersede the Circuit Court Order for specific performance, and instead chose to transfer the Subject Property by general warranty deed; and (2) holding that the Circuit Court Order granting specific performance was premature, and should have awaited a written ruling on BG's counterclaim, wherein BG protested the methodology and findings on the AEP Appraisal which was a non-binding, appraisal. These arguments are addressed serially below.

A. The Court of Appeals Opinion Should Be Reversed Because BG's Appeal Was Moot

The Court of Appeals Opinion held that, even though BG did not request a stay and, instead, satisfied the Circuit Court Order by conveying the Subject Property to AEP in return for a $3,426,012.63 payment, BG's appeal still was not moot. The Court of Appeals Opinion held that BG had no obligation to seek a stay, and suggested that requiring BG to seek such a stay might somehow have deprived BG of constitutionally protected appellate rights.[48] The Court of Appeals Opinion is wrong and should be reversed.

1. BG's Appeal Is Moot

It is "the universal rule" that Kentucky courts "will not consume their time in deciding moot cases, and have no jurisdiction to do so." *See Louisville Transit Co. v.*

[48] Court of Appeals Opinion at 9, fn 5.

Department of Motor Transportation, 286 S.W.2d 536, 538 (Ky., 1956). This Court defines a moot case as:

> [O]ne which seeks a judgment on a pretended controversy, when in reality there is none or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy. [*Id.*].

An appellate court is required to dismiss an appeal when a change in circumstances renders the court unable to grant meaningful relief to either party. *See Medical Vision Group, P.S.C. v. Philpot*, 261 S.W.3d 485 (Ky., 2008).

Here, BG's appeal should have been summarily dismissed because BG's voluntary conveyance of a general warranty deed to AEP rendered the appeal moot. The claim at issue in this appeal was one for specific performance of the Option, *i.e.*, the completion of the Final Appraisal and the sale of the Subject Property to AEP. All of this has now happened, and the obligations under the Option have already been performed: the Final Appraisal was issued and set the binding, Final Purchase Price; AEP timely exercised its contractual rights to purchase the Subject Property; BG performed its contractual obligations by selling the Subject Property to AEP in December 2012; and since that time AEP has owned the Subject Property free and clear, with no legal encumbrances, and BG has kept the $3,426,012.63 payment. Put simply, the dispute at issue in this appeal has been over for at least 2½ years.

If BG had wanted to appeal the Circuit Court Order, then BG had to do so prior to selling the Subject Property to AEP. Specifically, BG should have followed the proper procedure under Kentucky law and sought a stay of the Circuit Court Order and posted a supersedeas bond. *See* CR 73.04 and 73.06. Such a stay and bond would have delayed the transfer of the Subject Property until BG's appeal could be resolved. Notably, at the

Circuit Court's December 27, 2012 hearing the Circuit Court (and AEP's counsel) even discussed this very requirement with BG.[49]

Despite being put on notice of the proper appeal procedure, BG intentionally chose not to seek a stay of the Circuit Court Order and post a bond. Instead, BG voluntarily complied with the terms of the Option and the Circuit Court Order, and sold AEP the Subject Property for $3,426,012.63. There were, of course, several advantages to BG selling AEP the Subject Property as opposed to seeking a stay of the Circuit Court Order.[50] Regardless of BG's motivations for selling AEP the Subject Property, that sale is now final and BG has waived its right to complain about it under the Option because BG failed and refused to protect its appeal rights.[51]

BG deserves no sympathy because BG knowingly chose not to seek a stay and protect its appeal rights. Instead, BG intentionally seized on the Circuit Court Order and proceeded to closing a mere eleven days after that Circuit Court Order was issued and accepted AEP's $3,426,012.63 payment, thereby realizing important tax benefits by concluding the transaction in the 2012 calendar year, and also ensuring that AEP could

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[49] *See, e.g.* 12/27/12 Circuit Court hearing at 9:23:49 to 9:25:13 (the Circuit Court: "Now, the issue that, that causes everybody to say do we go forward with this, do we appeal. Then we'll deal with issues as to supersedeas bonds and things of that nature. Then you'll [AEP] have to decide whether or not you [AEP] want to [continue to purchase the Subject Property or move].").

[50] Including (1) BG received favorable tax treatment by selling the Subject Property by December 31, 2012, (2) BG did not have to post a large supersedeas bond to cover AEP's likely damages during the appeal and stay period, and (3) BG prevented AEP from vacating the Subject Property and moving to Ohio, as AEP had said it would do.

[51] *See, e.g. Sedley v. Louisville Trust Co.*, 419 S.W.2d 531, 532 (Ky., 1967) (appeal of order to sell property was moot, and the sale was final, because appellant failed to seek a stay of the order or post a supersedeas bond); *Justice v. Burgess*, 52 S.W.2d 720 (Ky. Ct. App. 1932) ("A 'waiver' is the voluntary surrender or relinquishment of a known legal right or intentionally doing an act inconsistent with claiming it.") (citation omitted).

not or would not decline the option and take the alternative step of purchasing the facility in Ohio. Having secured the benefits of the Circuit Court Order, BG should now be estopped equitably, as well as legally, from challenging its propriety.

2. The Court of Appeals Opinion Is Wrong Under Established Precedent

The Court of Appeals, in finding that BG's voluntary transfer did not moot its appeal, relied principally on this Court's decision in *Dreamers*, 366 S.W.3d at 381. In *Dreamers*, this Court essentially held that a party is not obligated to seek a stay of a money judgment in order to appeal that judgment. The Court of Appeals Opinion reasoned that the *Dreamers* decision applied to this appeal because there was no difference between a money judgment and the transfer of real property.[52]

The Court of Appeals Opinion is wrong because, among other reasons, it fails to recognize the material legal distinction between the payment of a monetary judgment and the voluntary conveyance of title to real property for payment. Put simply, real property is different than money. The rights of a buyer of real property far exceed that of naked possession, and also include the right to improve or alter the property, to subdivide it, to sell it to third parties, or to engage in any number of actions incident to property ownership. Many of these rights, if exercised, cannot be "undone" through a vacatur or reversal, years later, of the order that compelled the original transfer.

Specific performance is "an equitable remedy devised to apply in cases where common law actions for damages were found to be inadequate to afford a full remedy." *Billy Williams Builders and Dev. Inc. v. Hillerich*, 446 S.W.2d 280, 283 (Ky., 1969). Because real property is unique, "there can be little doubt that one may be entitled to the specific performance of a contract to purchase real estate and damages for delay in

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[52] *See* Court of Appeals Opinion at 8.

performance."[53] The distinction between real property and money is axiomatic in the context of specific performance, where it is clear that a buyer aggrieved by a seller's breach cannot be made whole by a simple award of money damages. AEP submits that the same rationale applies to the appellate issue here; AEP received, and BG voluntarily conveyed, fee simple title to a parcel of real property. Once clothed with that title, AEP acceded to all of the rights associated with that title, including the right to make improvements and add fixtures, which it did. It is impossible to unwind or undo a transaction of this sort and to restore the *status quo ante* -- in direct contrast to a case where one party has merely paid money to another, and the restoration is a matter of simple arithmetic.

Kentucky law requires an aggrieved party, like BG, to seek a stay and post a bond in order to protect their appeal rights in connection with the transfer of real property. For example, in *Sedley v. Louisville Trust Co.*, 419 S.W.2d 531 (Ky., 1967), the appellant claimed an interest in real property. The trial court ultimately ordered the sale of the real property. The appellant did not seek a stay of the order of sale and did not file a supersedeas bond. As a result, the real property was sold to a third party. The appellant then filed an appeal. The Court of Appeals dismissed appellant's appeal because the appellant had failed to protect her interest by filing a supersedeas bond and obtaining a stay. *See also Rose v. Cox*, 179 S.W.2d 871 (Ky., 1944).

Similarly, the majority of courts in the United States outside of Kentucky also have held that the transfer of real property is, in fact, fundamentally different than a debtor's payment of a monetary judgment, in connection with preserving the right to appeal. Federal and state courts throughout the country have repeatedly held that a

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[53] *Id.* at 282.

seller's decision to transfer property for payment pursuant to court order rather than obtaining a stay and securing a supersedeas bond, renders the seller's future appeal of the order moot. For example, in *Dahlin v. Amoco Oil Corp.*, 567 N.E.2d 806 (Ind. App. 1991), a lessee filed an action against a lessor for specific performance of an option to purchase a rented property.[54] The trial court entered summary judgment in favor of the lessee and, as here, the lessor promptly appealed, but also conveyed the property as ordered.[55] The Indiana Court of Appeals refused to entertain the lessor's appeal challenging the validity of the specific performance decree, finding the issue to be moot.[56] The majority explained its holding as follows:

> If a party to a judgment voluntarily acquiesces in or recognizes the validity of such judgment or otherwise takes a position which would be inconsistent with any theory other than the validity of the judgment, he has impliedly waived his right to contest the validity of the judgment on appeal. Thus, any subsequent appeal of that judgment becomes moot.
>
> After summary judgment was rendered on the specific performance issue in this case, the [lessor] sold the real estate to [the lessee] on July 28, 1989 for the sum of $83,900.00. That sum represented the $100,000 option price minus $16,100 in rent payments which [the lessee] had made since it had communicated its desire to the [lessor] to exercise the option to purchase. In closing the real estate transaction with [the lessee], the [lessor] took a position inconsistent with any theory other than the validity of the judgment for specific performance. **They could have forestalled selling the property to [the lessee] pending this appeal. By electing instead to sell the property, they have waived their right to argue on appeal that the specific performance decree was invalid**

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[54] *Dahlin* at 809.

[55] *Id.*

[56] *Id.*

> **and unenforceable, and therefore their appeal on this issue is moot.**[57]

A California appellate court reached the same conclusion in *Pacific Star Ventures v. Tan*, No. D047442, 2007 Cal. App. Unpub. LEXIS 7430 (Cal. App. Sept. 13, 2007) (attached hereto as Exhibit D). There, a buyer sued the seller for breach of the parties' real estate purchase contract, and sought a judgment of specific performance.[58] The trial court entered judgment in the buyer's favor, and the seller timely appealed.[59] The seller raised numerous objections to the trial court's order, but the California Court of Appeals dismissed the seller's appeal as moot.[60] The California Court of Appeals reached that result for two reasons. First, the seller "waived appellate review of the specific performance judgment by voluntarily accepting its benefits."[61] "Having received the money" from the buyer, the seller was "barred from prosecuting its appeal from the judgment insofar as the judgment order[ed] conveyance of the property."[62] Second, the court also made clear that the failure to secure a bond (called an undertaking in California) – represented another independent basis to deny relief: "the appeal [was] moot because [the seller] did not post an undertaking, the action was not stayed, and [the buyer had] already obtained specific performance of the judgment."[63]

> It is established that the reversal of a judgment or order pertaining to the conveyance of real property would be an "idle act" when the property was sold pending appeal.

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[57] *Id.* at 809-10 (internal citations omitted; bold added).

[58] *Pacific Star Ventures* at *1-2, 4.

[59] *Id.* at *5-6.

[60] *Id.* at *9.

[61] *Id.* at *15-16.

[62] *Id.* at *11 (quoting *Al J. Vela & Associates, Inc. v. Glendora Unified School Dist.*, 129 Cal.App.3d 766, 769 (Cal. Ct. App. 1982)).

[63] *Id.* at *16.

. . . .

> An appellant may not forego posting a bond and shift the risks of delay pending appeal to the respondent. . . . "The purpose of the undertaking is to protect the respondent . . . . The stay of enforcement inherently involved a risk of a decline in value of the property pending appeal. That risk should be borne by the party who appealed and her sureties, not by plaintiff, who was wronged by the stay."[64]

The California Court of Appeals refused to "unwind the conveyance" to the buyer.[65]

The District of Columbia Court of Appeals has also held that an appeal regarding the transfer of real property is moot when the appellant fails to seek a stay and, instead, voluntarily transfers the property pursuant to a court's specific performance order. In *Thorn v. Walker*, 912 A.2d 1192 (D.C. 2006) – a case with facts closely resembling those in this appeal – the plaintiff sued the defendant for specific performance in connection with the sale of the defendant's residential real property. The trial court ordered the defendant to sell the property to the plaintiff. The defendant did not seek a stay or post a bond. Instead, just as BG did in this case, the defendant voluntarily complied with the trial court's order and sold the property to the plaintiff, but then also filed an appeal. The District of Columbia Court of Appeals dismissed the defendant's appeal as moot because the defendant had already sold the property to the plaintiff:

> . . . the record reflects that the [property] was sold to the [plaintiff] as required by the trial court's final judgment and order. Moreover, on this record there is no indication that [defendant] involuntarily sold the property to [the plaintiff] after the trial court's judgment, and that she protested the sale by seeking a stay of the trial court's final judgment and order, or took other protective measures. Nor are we presented with a case concerning money damages where relief at the appellate level might not be foreclosed. Thus, we appear to be presented with a

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[64] *Id.* at *17-18 (internal citations omitted).

[65] *Id.* at *20.

> classic case of a moot appeal. That is, we discern no justiciable or live controversy, only an abstract, academic issue. . . . The trial court found that [the defendant] entered into a valid, binding contract with [the plaintiff] for the sale of the [property]. That property has been sold and [defendant] no longer has any right to possess it. As the Supreme Court said in *Brownlow*, '[a] reversal would ostensibly avoid an event which had already passed beyond recall.'[66]

Similarly, in *Haberer v. Newman*, 549 P.2d 975, 979 (Kan. S.Ct., 1976), the Supreme Court of Kansas relied on a long line of cases to determine that payment on a judgment in connection with the transfer of real property "cut off the payor's right to appeal."[67] In *Haberer*, the defendants entered into a contract to sell at auction a parcel of land. The plaintiffs purchased the land at auction.[68] After a dispute arose regarding the sale, and the defendants refused to sign over the deed, the trial court ordered that the clerk hand over the deed to the plaintiffs upon their payment of the purchase price.[69] After withdrawing a timely-filed motion to reconsider the amount of the supersedeas bond set by the court, the defendants complied with the judgment of the trial court by delivering a general warranty deed to the plaintiffs.[70] When the defendants filed a subsequent appeal, the plaintiffs moved for dismissal on the grounds that the defendants had given up their

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[66] *Thorn* at 1196-97 (citations omitted).

[67] *See also Muckey v. Baehr*, 145 P.2d 164, 165 (Kan. 1944) ("a litigant who voluntarily satisfies a judgment against him is not thereafter in a position to appeal it); *Sisk v. Edmonston*, 182 P.2d 891, 894-95 (Kan. 1947) (stating that "the general rule is that a judgment debtor, who satisfies a judgment against him, may not appeal therefrom" and that "anything that savors of acquiescence in a judgment cuts off the right to appellate review and that payment of costs by an appellant falls in that category."); *Comeaux v. West*, 97 Pac. 381, 381 (Kan. 1908) (holding that "when the defendants voluntarily surrendered possession they necessarily waived the right to prosecute error.").

[68] *Haberer*, 549 at 977.

[69] *Id.* at 978.

[70] *Id.*

right to appeal by voluntarily acquiescing to the judgment of the trial court.[71] The court stated that "the question of whether payment or performance of a judgment cuts off the defeated party's right to appeal depends upon whether such payment was voluntary."[72] The court held that the defendants had acquiesced to the judgment and were "foreclosed from exercising their right to appellate review" since they "voluntarily withdrew their motion to reconsider the amount of the supersedeas bond" and turned over the general warranty deed to plaintiffs.[73]

Various other courts have also held that a seller's conveyance of real property – and its concomitant acceptance of money for doing so – prohibits that party from thereafter complaining about a specific performance order.[74] The case law makes clear that transferring real property for payment pursuant to an order compelling specific performance, as opposed to seeking a stay, renders a future appeal of that order moot.

The judgments of sister states have further established that a purchaser/appellee in AEP's position may, like any other property owner, enjoy all rights, including the right of selling the property. For example, the Hawaii Supreme Court held that, absent a stay, an appeal regarding a court ordered transfer of real property is not only moot, but the appellee is also free to dispose of the real property in any manner it sees fit. In *Lathrop v. Sakatani*, 141 P.3d 480 (Haw. 2006), the plaintiffs filed a lis pendens on certain real

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[71] *Id.*

[72] *Id.* at 979.

[73] *Id.* at 980.

[74] *See Schuppener v. Bruno*, 395 So.2d 1234, 1234-35 (Fla. App. 1981) (appeal moot where seller accedes to specific performance judgment); *Braveheart Real Estate Co. v. Peters*, 157 S.W.3d 231, 233-34 (Mo. App. 2004) (same). *See also O'Brien v. Cacciatore*, 591 N.E.2d 1384, 1387-38 (Ill. App. 1992); *Reserve Life Ins. Co. v. Frankfather*, 225 P.2d 1035 (Col. 1950); *Ray v. Sullivan*, 568 N.W.2d 267 (Neb. Ct. App. 1997).

property. The trial court expunged the lis pendens. The plaintiffs then filed an appeal of the expungement order, but failed to seek a stay of the trial court's expungement order, to post a bond, or to otherwise encumber the property. While the appeal was pending, the defendant sold the real property. The Hawaii Supreme Court dismissed the appeal as moot because the plaintiffs had failed to seek a stay, holding that "it is appellant's burden to seek a stay if post-appeal transactions could render the appeal moot:"[75]

> Here, the plaintiffs failed to seek a stay on the execution of the circuit court's order expunging the lis pendens pending the disposition of the appeal. In addition, the plaintiffs were aware that a sale transaction had been scheduled. . . . Such failure permitted the defendants to proceed with the sale transaction. Consequently, the completed sale rendered the plaintiffs' appeal moot.[76]

This is precisely what happened here, despite the Circuit Court's clear guidance to BG about how it could supersede the Circuit Court Order and preserve its appeal rights.

In the bankruptcy context, federal courts also repeatedly held that a party's failure to seek a stay to prevent the ordered transfer of property renders any appeal of such a transfer moot. For example, in *Manges v. Seattle - First National Bank*, 29 F.3d 1034 (5th Cir. 1994), a bankruptcy court ordered the sale of the debtors' ranch property at auction. The debtors appealed, but did not obtain a stay of the order of sale and, as a result, the ranch property was sold in auction. The Fifth Circuit Court of Appeals dismissed the appeal because it was moot. Specifically, the court held that the failure to seek a stay warranted the dismissal of the appeal on mootness grounds.[77] The court

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[75] *Lathrop* at 486 (citation omitted).

[76] *Id.* at 487 (citations omitted).

[77] *Manges* at 1039-40.

referred to this problem of not seeking a stay as the challenge of "unscrambling the eggs."[78]

3. Public Policy Favors Reversing The Court of Appeals

This Court should reject the Court of Appeals Opinion because it also constitutes bad policy for the State of Kentucky. There are several basic reasons why a majority of the courts across this country, both state and federal, have rejected the Court of Appeals Opinion's reasoning, and have instead found that once real property is transferred, un-stayed appeals involving the transfer of real property are moot.

First, it is virtually impossible for a court to "unwind" court-ordered transfers of real property years after the transfer. As one court put it, to allow such appeals to proceed without a stay would require appellate courts "to traverse a totally impractical, perhaps impossible, course – one that might be as daunting as the reconstruction of Humpty Dumpty." *See MAC Panel Co. v. Virginia Panel Corp.*, 283 F.3d 622 (4th Cir 2002). Contrary to the Court of Appeals' reasoning, this is not like simply ordering a party to repay money previously awarded in a judgment. Real property is unique, which is why the majority of courts refuse even to try and unwind such transactions, likening that task to trying to "unscramble the egg."

This case is certainly the "poster child" for the impossible task of trying to "unscramble the egg." For example, since the voluntary transfer of the Subject Property occurred over 2½ years ago, AEP has been operating as a going-concern business at the

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[78] *Id.* at 1040. *See also In re Van Iperen*, 819 F.2d 189, 190 (8th Cir. 1987) (holding that "[o]nce collateral is taken and converted into cash, no court is able to formulate adequate relief to the debtor."); *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994) (once a sale has gone forward, the positions of the interested parties have changed . . . and court is faced with the unwelcome prospect of "unscrambl[ing] an egg.").

Subject Property, caring for the Subject Property, and making numerous improvements to the Subject Property. Among other things, AEP has:

- installed twelve million dollars of additional equipment at the Subject Property;
- hired approximately 35 new employees to work at the Subject Property; and
- paid property taxes and maintained the Subject Property.

AEP did all of these things in reliance on BG having complied with the Circuit Court Order and transferred the Subject Property to AEP in 2012. Also, because BG sold AEP the Subject Property in December 2012 (as opposed to obtaining a stay), AEP did not purchase an alternative (and cheaper) facility in Ohio and move, a move that also would have included substantial state and local tax credits. If, as the Court of Appeals Opinion permits, the order of specific performance were reversed, how would BG reimburse AEP for all of the costs AEP has incurred while holding the Subject Property for the last 2½ years? Likewise, how would AEP be compensated for the loss of the Ohio facility? In the case of a money judgment, the answer to such questions is easy, because money is fungible. In a case like this, there are no such answers.

In addition, for the last 2½ years BG has had the full use of AEP's purchase proceeds (totaling $3,426,012.63). If AEP had not paid BG the purchase money in December 2012, AEP could have invested those proceeds elsewhere (*e.g.*, in the stock market or in its business or in purchasing the Ohio facility or as a dividend to its shareholders). Those proceeds would have significantly increased in value given the improvement in the economy. For example, since December 2012, generally, the stock market has experienced double-digit annualized rates of return.

If a subsequent ruling caused the specific performance order to be reversed, and the transaction to be unwound, the parties would need to hire experts to try and calculate the total amount of AEP's costs incurred because BG voluntarily sold AEP the Subject Property. This would be costly and time consuming, and would likely require its own trial. By allowing BG to pursue this appeal without seeking a stay, the Court of Appeals Opinion, if upheld, would create potentially never-ending litigation for these parties.

A second policy reason for reversing the Court of Appeals Opinion is the fundamental business need for transactions involving the transfer of properties like the Subject Property, to have finality. Parties purchase real property like the Subject Property for business purposes, whether to use for their own business operations or to lease to third parties. Real property requires the owner/user to make significant and regular investments in the property, including repair and maintenance and investments, as well as in the business operations at that property. Businesses, like AEP, rely on the validity of their ownership of the property in order to make such significant investments. If, however, their ownership of the property were to remain in constant "flux" for years while appeals are pursued without stays or bonds, then owners simply would not be able to make such investments for fear of having it later determined that they did so to their detriment. Thus, such uncertainty would result in businesses not making important investments in their Kentucky properties and business operations.

Third, to do as the Court of Appeals Opinion now orders likely would require the Circuit Court to alter, *post-facto*, the parties' written contract. It is well established under Kentucky law that the courts should not rewrite a new contract for the parties.[79] Here, the parties already voluntarily complied with the Option, and in December 2012 the Subject

[79] *See e.g., Wilhoit v. Furnish*, 174 S.W.2d 515, 517 (Ky., 1943); *Schultz v. J.D. Copper*, 134 S.W.3d 618, 621 (Ky. Ct. App. 2003).

Property was transferred for the required payment. If the transaction had not happened in 2012, for whatever reason, then AEP likely would have declined to purchase under the Option, and would instead have moved to the alternate Ohio facility that AEP had under contract.[80] Under the Court of Appeals Opinion, however, the Circuit Court Order now effectively deprives AEP of that choice (*i.e.*, the "option" AEP contractually negotiated for under the Option), because AEP ultimately did not purchase the Ohio facility, and its letter of intent has since lapsed. AEP declined to proceed with the Ohio facility because in 2012 BG voluntarily sold the Subject Property to AEP pursuant to the Option. The courts cannot now resurrect AEP's expired right to purchase the Ohio facility several years later.[81] If the Court of Appeals Opinion were correct – which it is not – then to protect its business operations AEP should have abandoned its contractual rights to the Subject Property under the Option in 2012 (even though BG was willing to transfer the Subject Property to AEP), vacated the Subject Property, and purchased the new facility in Ohio and moved.[82] Such a result not only contradicts basic business logic, but it actually encourages business to leave the State of Kentucky.

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[80] *See* Pritchett dep. at 88-89 (RA 1127-1128).

[81] *See, e.g. Miller v. Hardin*, 233 S.W.2d 414 (Ky., 1950) (party equitably estopped from denying that purchaser had exercised his option to purchase property within time prescribed in lease); *Howard v. Motorists Mutual Insurance Co.*, 955 S.W.2d 525, 527 (Ky., 1997) (estoppel "offsets misleading conduct, acts, or representations which have induced a person to rely thereon to change his position to his detriment") (citations omitted).

[82] The mischief that the Court of Appeals Opinion has created in this case was evident immediately, and further supports why most courts refuse to go down this path and, instead hold that such appeals are moot. For example, on September 5, 2014, less than three months after the Court of Appeals Opinion was issued, BG filed a motion with the Circuit Court seeking an interim order transferring the Subject Property back to BG and asking the Circuit Court to manufacture a lease which the parties never agreed so that BG could claim a seven figure amount of above market rent against AEP for the 2½ year period in which AEP has owned the Subject Property (as well as future rents).

Of course, all of these issues and problems could have been avoided if BG had simply sought a stay to protect its appeal rights. The law of Kentucky, like that of most jurisdictions, gives a party a chance to protect its right to an appeal, avoid mootness issues, and guarantee that it can appeal an order compelling specific performance. All a party has to do to protect itself from its appeal becoming moot is to seek a stay and, if required, to post a supersedeas bond, thereby suspending the efficacy of the disputed order until the appeal is resolved. Requiring a party to seek such a stay to protect its appeal rights does not run afoul of any constitutional requirements, as the Court of Appeals Opinion suggests. Quite the opposite, requiring a party to file a stay to preserve an appeal is not materially different than the many other appeal procedural requirements that are mandated under Kentucky law, including filing deadlines which, if not followed, also can result in the dismissal of the appeal. *See* CR 73.02.

By erroneously analogizing this case to one involving a mere monetary judgment, the Court of Appeals Opinion not only erred, but did so in a way that will have profound and negative consequences on real estate transactions throughout the Commonwealth.

B. The Court Of Appeals Opinion Should Be Summarily Reversed Because The Circuit Court Order Was Not Premature

The Court of Appeals Opinion also held that the Circuit Court Order should be vacated because it was somehow premature. The Court of Appeals Opinion held that the Circuit Court was first obligated to resolve the claims raised in BG's counterclaims regarding the AEP Appraisal, *i.e.*, whether that appraisal "comports with Section 4 of the Option" because if it doesn't, then "AEP may have breached a material term of the Option and under Kentucky law would not be entitled to the remedy of specific

performance."[83] BG's complaints about the AEP Appraisal are that it "did not consider the highest and best use of the industrial property and the value of the special features and fixtures thereof as mandated by Section 4 of the Option."[84] These two complaints, however, are without merit as the Circuit Court Order granting specific performance plainly recognized. Therefore, the Court of Appeals Opinion is without legal or factual merit, constitutes bad public policy and should be summarily reversed.

1. The Circuit Court Ruled That The AEP Appraisal Was Proper

To begin, the Court of Appeals Opinion is wrong and the Circuit Court Order was not premature, because the Circuit Court did, in fact, specifically consider and reject BG's claims that the AEP Appraisal was somehow deficient. BG asserted its erroneous claims regarding the AEP Appraisal in both a counterclaim[85] and as affirmative defenses to AEP's Complaint for specific performance.[86] BG also specifically raised its erroneous claims regarding the AEP Appraisal as affirmative defenses in opposition to AEP's motion for summary judgment on AEP's specific performance claims (which motion was partially granted by the Circuit Court in its September 11, 2012 order). The Circuit Court then specifically heard and rejected those BG complaints regarding the AEP Appraisal in connection with that motion for summary judgment.

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[83] *See* Court of Appeals Opinion at 7.

[84] *Id.* at 4.

[85] The Circuit Court has not entered a separate order summarily dismissing BG's counterclaim regarding these claims/defenses because a motion for summary disposition has not been filed on those BG claims yet because this case has basically been on hold for the last 2½ years while this appeal is resolved. Furthermore, the Circuit Court has repeatedly made it clear that it would only allow BG to pursue a counterclaim for damages regarding BG's claim that AEP owed BG additional monies in connection with the condition of the Subject Property's roof. *See* 9/29/14 Circuit Court hearing at 9:35:37 a.m. to 9:36:36 a.m.

[86] *See, e.g.*, Answer And Counter-Claim Of Defendant B.G. Properties, Inc. at Third Defense and Sixth Defense (¶¶ 17, 19, 20, and 21) (RA 107-108).

In fact, at the September 29, 2014 hearing the Circuit Court further reconfirmed on the record that the Circuit Court had previously heard BG's complaints and concluded that the AEP Appraisal was proper:

> **Circuit Court:** Well, then help me with what...take me back there then...because I thought that we came to a point where I ruled that the first two appraisers....appraisals...were proper. I, I think that... how would we have gotten to the next step where I would have ordered the third appraisal.[87]

Second, as the Circuit Court already correctly held, BG's two complaints regarding the AEP Appraisal (*i.e.*, the "highest and best use" conclusion and the alleged absence of "special features and fixtures"), had no merit whatsoever. To begin, on these two BG complaints the AEP Appraisal was basically identical to the non-binding BG Appraisal. For example, the "highest and best use" conclusion in the AEP Appraisal and the BG Appraisal are nearly identical. Specifically, the AEP Appraisal concludes that the "highest and best use" is as follows:

> As improved, the subject involves an industrial-oriented facility. The current use is legally permissible and physically possible. The improvements continue to contribute value to the property and based on our analysis, the existing use is financially feasible. Therefore, it is our opinion that the highest and best use of the subject, as improved, is for continued industrial related use.[88]

And the BG Appraisal's "highest and use" conclusion is as follows:

> For the reasons stated above, the highest and best use of the subject site, as vacant is for industrial development for uses like manufacturing. The subject is improved with 167,415 square feet of manufacturing facility, which is the highest and best use, as improved. This is an established manufacturing facility, which has experienced good

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[87] *See* 9/29/14 Circuit Court hearing, at 9:40:08 a.m. to 9:40:26 a.m.

[88] AEP Appraisal, at 31 (a copy of the referenced page is attached hereto as Exhibit E).

> occupancy over the years. Based on the market profile in the above analysis, it is concluded that the existing improvements contribute value over and above the value of the site as vacant. The highest and best use of the subject property is as is with a manufacturing facility.[89]

Thus, given that both parties' appraisers concluded to virtually the same "highest and best use" (*i.e.*, as an industrial manufacturing use), it is inconceivable how BG's claim that the AEP Appraisal's "highest and best use" somehow violates the Option, or how such an obviously erroneous BG claim could form a meaningful basis for vacating the Circuit Court Order and revoking the sale of the Subject Property to AEP.[90]

Similarly, BG's complaint that the AEP Appraisal did not separately value the "special features and fixtures" is equally meritless. Again, the AEP Appraisal and the BG Appraisal accounted for the "special features and fixtures" in the same manner, *i.e.*, by including them in the total value for the Subject Property. Neither parties' non-binding appraisal separately broke out, on an item-by-item basis, the value of each alleged "special feature and fixtures."[91] It is inconceivable how BG could allege that the AEP Appraisal was somehow defective in its treatment of the purported "special features and fixtures" when the BG Appraisal handled those purported items in nearly the exact same way. This is, of course, in part, why the Circuit Court rejected those erroneous BG

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[89] BG Appraisal, at 74 (a copy of the referenced page is attached hereto as Exhibit F).

[90] These nearly identical "highest and best use" conclusions in the parties' two non-binding appraisals are also basically the same as the "highest and best use" conclusion in the Final Appraisal for the Subject Property prepared by Pritchett. *See* Final Appraisal at 4 (the highest and best use of the Subject Property, as improved, is as "a medium size manufacturing facility") (RA 678).

[91] The Final Appraisal was the only appraisal that specifically separated out from the total value conclusion of the Subject Property specific values for each of the identified "special features and fixtures located therein for AEP's use as an extrusion and flexibility packing and manufacturing facility." *See* Final Appraisal at 33-34 (RA 707-708). In fact, an entire section of the Final Appraisal is entitled "*Additional Value of Special Features & Fixtures.*"

arguments in 2012, granted AEP summary judgment, and entered the Circuit Court Order.[92]

A cursory review of the BG Appraisal and the AEP Appraisal makes clear that the AEP Appraisal did not violate the requirements of the Option by BG. BG made those arguments to the Circuit Court, and the Circuit Court rejected them.

The fact that the BG Appraisal and the AEP Appraisal address the "highest and best use" and "special features and fixtures" elements in nearly identical ways eliminates any claim that the AEP Appraisal contravenes the plain language of the Option. But even if BG were correct that the AEP Appraisal were deficient – and it is not – this would be of no help to BG, inasmuch as its own appraisal, which it secured before AEP secured is appraisal, suffered the same flaws. BG's complaints, therefore, lead only to the conclusion that any breach by AEP, even if material, followed a first breach by BG. Either way, the Circuit Court Order was correct and should be affirmed.

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[92] BG only complains about the AEP Appraisal (and the Final Appraisal) because BG wants the final purchase price to be greater. However, the principal reason for the difference between the values in the BG Appraisal and the AEP Appraisal has nothing to do with BG's complaints. Instead, the difference is because the AEP Appraisal appraised the "fee simple" interest of the Subject Property; and the BG Appraisal appraised the "leased fee" interest (which erroneously assumed that the Subject Property had a long term lease in place). *See* Circuit Court Order, at ¶2. The AEP Appraisal correctly appraised the "fee simple" interest because there was no lease in place, the Sublease having already expired in August 2011 (and AEP thus had only a month-to-month tenancy). Therefore, AEP was purchasing only the "fee simple" interest of the Subject Property; not a "leased fee" with a long term tenant in place. Similarly, any other buyer of the Subject Property also would only be purchasing the "fee simple" interest of the Subject Property, *i.e.*, a vacant building available for immediate occupancy or lease – and not a property with a tenant in place subject to a long term lease. This is the textbook appraisal definition of a "fee simple" interest. *See e.g.* fns 6 & 7, *supra*; Pritchett dep. at 89, 105-107 (RA 1128, 1132); *Kentucky Dep't of Revenue v. Hobart Mfg.*, 549 S.W.2d 297, 299 (Ky., 1977) ("fee simple title to real estate and the improvements thereon is no more than a bundle of all of the rights one could have in and to the property").

2. BG Was Not Justified In Suspending Performance Based On The Alleged Breach

BG's complaints about the AEP Appraisal also fail on the basis that they are not material to the parties' contract. It is well established that under Kentucky law a party can only suspend its performance of a contract if there has been a material breach. *See, e.g. Fay E. Sams Money Purchase Pension Plan v. Jansen*, 3 S.W.3d 753, 757 (Ky. Ct. App. 1999). A material breach is one that is "so substantial and fundamental as to defeat or to render unattainable the object of the parties in making the agreement." *See Beattie v. Friddle*, 17 S.W.2d 246, 248 (Ky., 1929). *See also Evergreen Land Co. v. Gatti*, 554 S.W.2d 862, 865 (Ky. Ct. App. 1977). In the context of the three-appraisal model contained in the Option (and common in real estate contracts in Kentucky and elsewhere), one party's gripe about the other party's preliminary and non-binding first appraisal cannot rise to the level of materiality.

Here, BG's alleged dissatisfaction with the non-binding AEP Appraisal does not, and cannot, constitute a material breach of the Option which would have allowed BG, as a matter of law, to suspend performance of the Option. The AEP Appraisal (like the BG Appraisal) was non-binding on the parties under the Option, and ultimately had absolutely no effect on the eventual Final Purchase Price, which was ultimately determined and fixed by the Final Appraisal from Pritchett. Under the Option, the sole purpose of each party selecting and securing an initial appraisal is to assist the parties in determining whether they can set a price through mutual agreement. Once that exercise fails, as it did here when the BG Appraisal was greater than the AEP Appraisal (and ultimately Pritchett's) by several orders of magnitude, the Option requires an independent third appraisal. The result of that Final Appraisal is binding, and just as plainly the results of the two non-binding appraisals that preceded it are academic and of no

consequence to the Final Purchase Price. The fact that BG does not agree with the AEP Appraisal – and vice versa – does not "defeat the entire purpose" of the Option, any more than does the fact that the parties still cannot (and likely never will) mutually agree on the purchase price for the Subject Property. Instead, such disagreements mean only that an independent third appraisal will be necessary, as it was here. Disputes over the preliminary and non-binding appraisals cannot rise to the level of materiality. When the Circuit Court Order compelled the independent third appraisal, and then again when it compelled BG to abide by its result, it was merely enforcing the parties' unambiguous agreement.

Finally, BG's erroneous complaints regarding the AEP Appraisal are now irrelevant because the independent third appraisal has already been completed, and BG has already sold the Subject Property to AEP. Thus, even if, *arguendo*, changes were made to the AEP Appraisal as alleged by BG, the AEP Appraisal would still not be binding on the parties, and they still would have no effect whatsoever on the Final Appraisal or the Final Purchase Price as determined by Pritchett. Under the Option the independent third appraiser's conclusions are final and govern, regardless of the parties' non-binding appraisals.

3. The Court Of Appeals Opinion Constitutes Bad Public Policy

Beyond its effect on the present dispute, the Court of Appeals Opinion, if not reversed, would wreak havoc on commercial real estate option agreements like the one at bar. Appraisal provisions like the one in the Option are commonplace in commercial real estate transactions, and are designed precisely to avoid the sort of protracted litigation that the Court of Appeals Opinion would enable here. It goes without saying that sellers and buyers of real property are almost always at odds over the purchase price – sellers

wanting to be paid a higher sale price, and buyers wanting to pay a lower price. Business professionals use appraisal provisions like the one in the Option because, while parties may try in good faith to find common ground on valuation issues, they often cannot. In those situations, it is common for parties to entrust a neutral and qualified appraiser to "make the call" and determine the final binding purchase price. This avoids having to expend significant costs in litigation, and potentially years fighting in the courts – all the while as the real property lies in a state of perpetual "limbo."

Under the Court of Appeals Opinion, however, such contract provisions are now rendered meaningless, and parties basically have to fight in court over each appraisal obtained, even the appraisals that are non-binding. After all, there is no need for an independent third appraisal if the parties had been able to agree on a purchase price based on their non-binding appraisals. Under the Court of Appeals Opinion, parties now have to engage in up to as many as three separate lawsuits in order to enforce their contractual options to purchase real property: one lawsuit over the veracity of the seller's non-binding appraisal; one lawsuit over the veracity of the buyer's non-binding appraisal; and one lawsuit over the independent third appraiser's appraisal. This is not only a waste of resources, but detrimental to the business community, will result in endless protracted litigation, and renders meaningless the entire reason for having such option provisions (*i.e.*, to resolve disputes quickly and avoid such litigation). Put simply, the Court of Appeals Opinion is bad law and policy, ignores the unambiguous terms of a written agreement between sophisticated business persons, and harms the business community of this State.

C. BG's Anticipated Arguments Regarding The Independent Third Appraisal Are Without Merit And Not Relevant

AEP anticipates that, in response to this Brief, BG may argue that the Final Appraisal prepared by Pritchett also contained alleged defects that somehow further render the Circuit Court Order reversible.[93]

BG's claims regarding the Final Appraisal are without merit and should be summarily rejected for several reasons. First, BG's purported objections regarding the Final Appraisal are not relevant to the only two issues concerning the Court of Appeals Opinion which were actually asserted in AEP's application for leave to appeal, and which are now before this Court pursuant to this Court's June 3, 2015 Order Granting Discretionary Review, *i.e.*, whether BG's appeal was moot because BG did not seek a stay, and whether the Circuit Court Order was premature.

Second, even assuming, *arguendo*, that BG's objections regarding the Final Appraisal are somehow relevant to this appeal – which they are not – those BG objections are still without factual or legal merit. In support, and to preserve judicial resources, AEP incorporates by reference its brief on appeal that AEP filed with the Court of Appeals. Among other things, the AEP Court of Appeals' brief on appeal sets forth in extensive detail the reasons why BG's objections regarding the Final Appraisal are without merit.[94]

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[93] BG previously alleged at the Court of Appeals that the independent third appraisal (1) should not have appraised the "fee simple" interest in the Subject Property even though that was the interest that was being sold to AEP; (2) failed to include the value of other "special features and fixtures" and "price elements" that BG manufactured, for the first time, on appeal, and (3) used an incorrect square footage for the subject building, which was a mere 415 sf less than the one used in the BG Appraisal and which had no material impact whatsoever on the Final Value.

[94] *See, generally*, AEP's Court of Appeals Brief.

CONCLUSION

For the reasons set forth herein, AEP respectfully requests that this Honorable Court enter an order reversing and vacating the Court of Appeals Opinion, and reinstating the Circuit Court Order.

Respectfully submitted,

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